

**Missouri Essay Question 1**  
**July 2003 Bar Examination**  
**Trusts**

**I**

Agatha and Bertha are sisters living in Bootheel, Missouri. Several years ago, Agatha opened a savings account at the Bootheel National Bank in her name as trustee for Bertha. There was no written or oral trust agreement associated with the account. Agatha, who kept possession of the passbook, routinely deposited an annuity check she received in this account. Periodically, she made withdrawals from the account, and spent the money on herself. Agatha died recently, leaving a Will that bequeathed the savings account at Bootheel National Bank held as trustee for Bertha to the sisters' niece, Charlotte. At Agatha's death, there was \$10,000.00 in the savings account.

Who is entitled to the money in the savings account, Bertha or Charlotte? Explain your answer.

**II**

Terry is the trustee of a trust which includes, among other assets, a large warehouse located in a run-down part of Bootheel, Missouri. The warehouse produced significant rental income at the time the trust was created. Now, however, the warehouse has been vacant for several years and has fallen into disrepair. Terry believes that it would be in the best interest of the beneficiaries of the trust to sell the warehouse, both because it would be expensive to repair the structure and because it is difficult to rent given the warehouse's location. However, the Trust indenture expressly prohibits the trustee from selling any real estate owned by the Trust.

Can Terry sell the warehouse? If so, how? Explain your answers.

**III**

Tina loved cats. She was particularly fond of Hairball, a Persian cat that had belonged to Tina for many years. At her death, it was discovered that Tina made provision for Hairball in her Will. She left \$100,000.00 to her brother, Tom, as Trustee for the

purpose of providing and caring for my beloved 'Hairball' all her remaining days. Does Tina's Will create a valid Trust or otherwise obligate Tom to take care of Hairball? If so, for how long? Explain your answers.

**Missouri Essay Question 2**  
**July 2003 Bar Examination**  
**Decedents' Estates**

Joe and Jane met late in life following the deaths of their first spouses. Joe was 72, and Jane was 68 when they decided to marry. Joe had 3 living children from his first marriage and Jane had 2 from her first marriage. At the time of their marriage, both were in good physical and mental health. They agreed that neither of them would claim any interest in the property of the other, but the agreement was never reduced to writing.

Shortly after their marriage, Joe and Jane executed valid Wills under the terms of which all of Joe's property was left to his children, and all of Jane's property was left to her children. They also executed Durable Powers of Attorney with General Powers for All Purposes, and named each other as the primary attorney in fact.

After about 10 years of marriage, Joe began to fail both physically and mentally, but because Joe was strongly opposed to going to a nursing home, Jane kept Joe at home and provided for his care. On some days when Joe was particularly ill or thinking poorly, this demanded Jane's full time attention. In addition, Jane took care of substantially all of the financial matters for both she and Joe, and at times, utilized her power of attorney to act on Joe's behalf with respect to various financial and business affairs. Joe remained close (in an emotional sense) to his children and they visited him as frequently as possible, but because none of them lived in Missouri, they were unable to provide Jane with much assistance. During some of those visits, Joe became confused about which of his children were there, and occasionally called Jane by the name of his first wife (his children's mother). At other times, Joe was completely oriented.

After about 3 years of day and night care, Jane decided that it was only fair that Joe leave Jane's children his estate as she was well fixed financially and had orally agreed to waive her rights in Joe's estate, but her children were struggling financially and she believed that her children should receive the benefit of her extraordinary care of Joe. Accordingly, she began to suggest to Joe that he change his Will to leave his estate to her children. Joe resisted, but Jane reminded

him that if it was not for her, he would be in a nursing home, that his children had done nothing to help take care of him, and that he owed it to her to do what she wanted. These discussions continued off and on over a period of several weeks. Finally, Joe relented and told Jane to take him to a lawyer to change his Will.

Jane made an appointment with the lawyer that she and her deceased husband had always used. When they arrived at the lawyer's office, Jane accompanied Joe in to the consultation room, and Jane told the lawyer what Joe wanted to do. The lawyer asked Joe if that was true, and Joe merely responded, "Yes, I guess so." The lawyer then proceeded to draw a new Will that left all of Joe's estate to Jane's children. That Will was signed by Joe a couple of days later, and witnessed as a self-proving Will in compliance with Missouri law. Jane was present in the lawyer's office during the initial conference when the Will was discussed, and later when it was executed.

At the time Joe executed his new Will, he had been diagnosed with a multitude of physical ailments, including congestive obstructive pulmonary disease (COPD) and Parkinson's disease; and had also been diagnosed as having dementia, which is defined by medical authorities as "the loss of mental functions -- such as thinking, memory, and reasoning -- that is severe enough to interfere with a person's daily functioning". However, dementia is also characterized in some patients, including Joe, as being worse at some times than others, so that the thinking, memory and reasoning abilities are sometimes relatively intact, and at other times they are not. Joe saw his family practice physician at least monthly, and that physician has a sizeable medical file that describes Joe's medical and mental condition. In fact, Joe had been to see the doctor a week before the first trip to the lawyer, and at that time, the doctor noted that Joe was oriented as to person, place and time. However, the file also contains the report of a consulting psychiatrist to whom the family physician had sent Joe about a year before for an evaluation of his mental condition. That report stated that Joe suffered from dementia, the most probable cause of which was Parkinson's disease, that the dementia was considered to be untreatable and that it would progressively worsen.

Six months after Joe wrote his new Will, Jane had a heart attack and died suddenly and unexpectedly. Joe died a month later, and his children became aware of the new Will when Jane's children offered the new Will for Probate. Joe's children found that the old Will was still in the possession of their dad's regular attorney who had always represented him, and offered that Will which left everything to them. The Court admitted the new Will as it was valid on its face and was the latest dated instrument.

Joe's children now seek your advice as to what they can do. Specifically, you are asked to advise them regarding the following issues:

1. What actions should they take to contest the validity of the Will that was admitted to Probate, and how long do they have to take those actions?
2. What legal theories exist to contest the Will that appear to be applicable under the facts of this case and what are the elements of proof of those legal theories? (NOTE: They are not interested in hearing a dissertation on all legal theories that might exist to contest a Will – only those that are applicable to their situation)
3. What is the burden of proof with respect to each legal theory that appears to be applicable to these facts?
4. What facts support the legal theories that will be used to contest the Will, and what facts do you expect will be used to defend the validity of such Will? Based on those facts, what is your opinion as to the probable outcome of a legal action to contest the validity of Joe's Will, and why do you hold this opinion.

**Missouri Essay Question 3**  
**July 2003 Bar Examination**  
**Missouri Civil Procedure**

**THE FACTS**

Al Trespasser and Bob Landowner, a real estate tycoon, first met in Anytown County, Missouri many years ago. The two were introduced by Clara Escrow. The two got along well and Bob Landowner asked Al Trespasser accompany him on several fishing trips on some land that Bob Landowner owned in Anytown County. Al Trespasser stayed in Anytown County. Bob Landowner moved away from Anytown County.

After Bob Landowner left, Al Trespasser began selling fire wood and landscape timbers that he obtained by cutting lumber from Bob Landowner's land. Al Trespasser ultimately cut and sold \$80,000 worth of lumber from Bob Landowner's land. Al Trespasser did not get Bob Landowner's consent before cutting and taking the lumber and was trespassing on Bob Landowner's land when he cut the lumber. Clara Escrow was aware of Al Trespasser's lumbering activities but she was not aware of the fact that he did not have permission from Bob Landowner nor did she have a duty to inquire.

More than 5 years had passed since Al Trespasser's last activities on Bob Landowner's land. It was only then that Al Trespasser decided to try to purchase the land. Al Trespasser offered Bob Landowner \$80,000 for the land. Bob Landowner had not seen the land in over 5 years but felt that the price was fair based upon his memory of the area. Bob Landowner and Al Trespasser signed a contract under which Al Trespasser was to purchase the land for \$80,000. The two also executed an agreement with Clara Escrow whereby Clara would act as the escrow agent in the land for cash transaction. Thus, Clara received \$80,000 from Al Trespasser and a fully executed deed from Bob Landowner.

The escrow contract required Clara Escrow to transfer the \$80,000 to Bob Landowner and to record and transfer the deed to Al Trespasser at the expiration of a specified number of days. Before the expiration of the specified number of days, Bob Landowner returned to Anytown

County and discovered that the timber had been removed from the land. Bob Landowner contacted Al Trespasser who promptly told Bob Landowner that he had taken the timber more than 5 years ago but had not been on the land at all since then.

Bob Landowner refused to conclude the land sale transaction and demanded that Clara Escrow return the deed and that both she and Al Trespasser pay \$80,000 as damages for the trespass. Al Trespasser demanded that Clara record the deed and give him the original. Clara refused both demands.

Bob Landowner filed a lawsuit in the Anytown County Court against both Al Trespasser and Clara Escrow. The lawsuit alleged that Al Trespasser trespassed on the land and cut and carried away the trees growing there and that Clara Escrow participated by aiding Al Trespasser in his trespass. The lawsuit demanded \$80,000 in damages for trespass against Al Trespasser and Clara Escrow, jointly and severally.

Al Trespasser and Clara Escrow filed separate answers to Bob Landowner's lawsuit in which each generally denied all of Bob Landowner's claims.

#### SUBSTANTIVE LAW

Assume that the Missouri statute of limitations provides that "[a]n action for trespass on real estate" must be brought within five years of the trespass. §516.120(3) RSMo.

#### THE QUESTIONS

1. Is there anything else that Al Trespasser and Clara Escrow need to include in their separate answers to Bob Landowner's lawsuit to assure that all of their defenses against Bob Landowner's claims are preserved? Explain fully.
2. Is Al Trespasser allowed to bring a counterclaim and/or cross claim against Bob Landowner and Clara Escrow to enforce the real estate sale and escrow contracts in the proceeding initiated by Bob Landowner's trespass lawsuit? If Al Trespasser does not

bring an action to enforce the real estate and escrow contracts in Bob Landowner's trespass proceeding; will he have the right to do so in an independent and separate action filed later? Explain fully.

3. Does Clara Escrow have any counterclaim, cross claim or other procedural recourse available to her with respect to the dispute between Al Trespasser and Bob Landowner concerning the \$80,000 and the deed? If so, what counterclaim, cross claim or other procedural recourse and against whom? Explain fully.

**Missouri Essay Question 4**  
**July 2003 Bar Examination**  
**Remedies**

Paul Physician comes to see you and he tells you that nine months ago he went to work for The Doctors' Group here in Main, Missouri as an oncologist. Before he started, he signed an employment contract with The Doctors' Group with the following two provisions:

3. *SERVICES*: Employee agrees to devote substantially his entire time and attention to the practice of medicine for the corporation. The Employee shall not, without the express prior written consent of Employer, directly or indirectly during the term of this Agreement or for a period of twenty-four (24) months thereafter as more particularly detailed in Paragraph 13 of this Agreement, render services of a professional nature to or for any person or firm for compensation, or engage in any activity competitive with and adverse to Employer's business or practice, whether alone, as a partner or as an officer, director, employee or shareholder of any other corporation or as a trustee, fiduciary or other representative of any activity.

Paragraph 13 of the contract states:

13. *NON-COMPETITION AGREEMENT*: Employee agrees that, should his/her employment with Employer be terminated for any reason whatsoever, during the twenty-four (24) month period beginning with the date of the termination of Employee's employment, Employee will not, for himself or herself, on behalf of or for the benefit of any other person, firm, partnership or corporation perform any medical services or engage in the practice of oncology within seventy-five (75) miles of Employer's office located at 1234 Main Street, Main, Missouri on Employee's account, or otherwise solicit, service, refer to handle any medical business or engage in the practice of oncology for any patient of Employer who was a patient of Employer on the date of the termination of physician's Employment with Employer.

Paul Physician tells you that before he went to work for The Doctors' Group, he had his own practice for about 6 months in Main, Missouri. He was trying to develop a patient base but he found it difficult and decided to sign a contract with The Doctors' Group. The contract guaranteed him an annual salary of \$100,000. When he worked for The Doctors' Group he saw over 500 patients, and these were patients who were either already patients of The Doctors' Group or who came to The Doctors' Group during the time he practiced there. The Doctors Group has been in existence in Main, Missouri for over 40 years and patients come from a 5-

state radius. Paul Physician tells you that within a month of signing the contract with The Doctors' Group, he started a separate medical practice 100 miles away. While employed by The Doctors' Group, he would refer the patients he saw there to his private practice and he did not share any of these revenues with The Doctors' Group.

The other doctors at The Doctors' Group found out about Paul's other private practice and fired him. They informed him they are going to court to get an injunction to prohibit him from practicing within 75 miles of Main, Missouri and to prohibit him from treating any patients of The Doctors' Group even if outside 75 miles from the office of The Doctor's Group. Paul thinks that Missouri courts would find such a covenant not to compete void as a restraint on trade, especially as it relates to physicians providing much needed medical care to individuals.

- 1. Is the trial court likely to grant injunctive relief prohibiting Paul Physician from providing oncology treatment to individuals within 75 miles of the office of The Doctors' Group for 24 months following Paul Physician's termination? What factors will the trial court consider in determining whether to grant injunctive relief?**
- 2. Is the court likely to grant injunctive relief prohibiting Paul Physician from treating any patients of The Doctors' Group who were patients of the group at the time Paul Physician was terminated for 24 months following his termination even if he wants to treat these patients in his office located more than 100 miles from The Doctor's Group office? What factors will the court consider in determining whether to grant injunctive relief?**
- 3. Paul Physician tells you that The Doctors' Group breached the contract first by refusing to pay him the salary guaranteed by the contract and that is why he later formed his separate medical practice 100 miles away. Would this fact, if proven at the trial, make any difference in the court's analysis of whether to grant injunctive relief? Why or why not?**